A **LAMA TILE (TIMUR) SDN BHD v. LIM MENG KWANG & ANOR**

COURT OF APPEAL, PUTRAJAYA
MOHAMAD ARIFF YUSOF JCA
MAH WENG KWAI JCA
DAVID WONG DAK WAH JCA
B [CIVIL APPEAL NO: D-02(NCVC)(W)-735-03-2013]
30 DECEMBER 2014

COMPANY LAW: *Directors – Director's responsibility for fraudulent trading – Judgment obtained against company to recover debt – Subsequent change of company's name – Whether with fraudulent intent to defraud judgment creditor – Whether directors could be held liable – Standard of proving requisite ingredients of s. 304(1) of Companies Act 1965 – Whether action against directors was res judicata*

D The respondents were common directors and shareholders of two companies namely LMK Edaran Sdn Bhd ('LMK Edaran') and SLMK Edaran Sdn Bhd ('SLMK Edaran'). LMK Edaran purchased some building materials from the appellant. Upon LMK's request, the appellant delivered a quantity of building materials between the months of October 2004 and April 2005. The total cost of the materials were RM309,481.20. None of the delivered items E were paid by LMK. Together with the accumulated interest, the total indebtedness was RM316,057.42 ('the debt'). The appellant demanded the debt from the respondents but the attempt proved futile. This led the appellant to file an action against LMK in the High Court ('first suit'). The High Court entered judgment against LMK. It was common ground that the F sealed judgment of the first suit was not served on LMK. It was also disclosed that shortly after the letter of demand was sent before filing the first suit, LMK had changed its company name to SLMK Edaran. Company searches disclosed that in 2005, LMK Edaran was an active company, with SLMK Edaran being a dormant company, however, the position was subsequently G reversed. In these circumstances, the appellant filed a second suit ('second suit') under s. 304(1) of the Companies Act 1965 (the 'Act') against the respondents. The claim was grounded on fraudulent trading by LMK Edaran and the respondents by which the appellant, as creditor of LMK Edaran, was defrauded in the sense that after judgment had been obtained against LMK H Edaran, the business of LMK Edaran was transferred to SLMK Edaran, to defeat the rights of the appellant as the judgment creditor. The appellant's second suit was dismissed by the High Court on the grounds, *inter alia*, that (i) it was barred by *res judicata* because the second suit was based on the first suit and therefore the same cause of action; and (ii) the appellant's claim was premature since the sealed judgement of the first suit was not served on the I respondent, the respondent could not be said to be evading the judgment sum by the change of the company name. Hence, the present appeal.

Held (allowing appeal with costs; setting aside judgment of High Court) Per Mohamad Ariff Yusof JCA delivering the judgment of the court:

(1) There was sufficient evidence to prove fraudulent trading within the meaning of s. 304 of the Act. The High Court had misdirected itself on the pleaded case of the appellant, and further had misdirected itself on the applicable law as well as failed to properly evaluate and appreciate the evidence before the court which showed a patently clear case of an intention to defraud the appellant. (para 3)

(2) On the proper reading of the statement of claim, it was not the pleaded case of the appellant that the respondents had changed the name of LMK Edaran to SLMK Edaran and therefore defrauded the appellant as creditor. It was expressly pleaded that it was Southern Taipan Sdn Bhd that had its name changed to SLMK Edaran. What the appellant pleaded was not so much a name change as understood by the High Court, but an attempt to defraud creditors by changing the signboard of LMK Edaran by adding the alphabet 'S' in front of 'LMK', and thereafter rendering LMK Edaran dormant by transferring its business to SLMK (previously Southern Taipan Sdn Bhd). Thus the High Court had fundamentally misconstrued the appellant's pleaded case, leading to a major error requiring appellate intervention. (paras 21 & 22)

(3) There was no real issue of *res judicata* since an action under s. 304 of the Act was based on a specific and different cause of action. It was not based on recovery of debt *per se*, but on the personal liability of the persons involved in the fraudulent course of carrying on the business of the company to avoid paying creditors. One cannot reasonably conclude that reading the pleaded claim against the directors/shareholders with precision, it is the same with the previous claim against the company. Section 304 deals with dishonest conduct which involved real moral blame according to current notions of fair trading. (para 24)

(4) Section 304 only uses 'if it appears' which indicated that a lower degree of proof was required, and it was necessary to prove an 'intention' to defraud. Therefore the appellant had adduced sufficient evidence of the intention to defraud on a balance of probabilities to justify that all the requirement under s. 304 had been proved. (para 25)

(5) The issue of the claim being premature was without merit. If the appellant was minded to enforce the judgment against the company, the appellant would have to extract the sealed judgment and serve on LMK Edaran, now masquerading as SLMK Edaran, but the appellant had elected to proceed against the respondents under s. 304 of the Act. This was an independent cause of action. (para 27)

Bahasa Malaysia *Translation Of Headnotes*

Responden-responden merupakan pengarah-pengarah yang sama dan pemegang-pemagang saham kedua-dua syarikat iaitu LMK Edaran Sdn Bhd ('LMK Edaran') dan SLMK Edaran Sdn Bhd ('SLMK Edaran'). LMK Edaran telah membeli bahan-bahan binaan daripada perayu. Atas permintaan LMK, perayu telah menghantar sejumlah bahan binaan antara bulan Oktober 2004 dan April 2005. Jumlah kos bahan-bahan tersebut adalah RM309,481.20. LMK tidak membuat bayaran bagi bahan-bahan yang telah dihantar. Berserta dengan faedah terkumpul, jumlah keberhutangan adalah RM316,057.42 ('hutang'). Perayu telah menuntut hutang tersebut daripada responden-responden tetapi tidak berjaya. Perayu, oleh itu, memfailkan tindakan terhadap LMK di Mahkamah Tinggi ('guaman pertama'). Mahkamah Tinggi telah memasukkan penghakiman terhadap LMK. Tidak dinafikan bahawa penghakiman yang termeterai dalam guaman pertama tidak disampaikan kepada LMK. Juga didedahkan bahawa tidak lama selepas surat tuntutan dihantar dan sebelum memfailkan guaman pertama, LMK telah menukar nama syarikatnya kepada SLMK Edaran. Carian syarikat mendedahkan bahawa pada tahun 2005, LMK Edaran adalah sebuah syarikat yang aktif, dengan SLMK Edaran sebagai sebuah syarikat yang tidak aktif, bagaimanapun, kedudukan tersebut kemudian telah terbalik. Dalam keadaan ini, perayu telah memfailkan tindakan kedua ('guaman kedua') di bawah s. 304(1) Akta Syarikat 1965 ('Akta') terhadap responden-responden. Guaman kedua berlandaskan perniagaan secara fraud oleh LMK Edaran dan responden-responden di mana perayu, sebagai pemiutang LMK Edaran, telah ditipu dalam erti kata bahawa selepas penghakiman telah diperolehi terhadap LMK Edaran, urusan LMK Edaran telah dipindahkan kepada SLMK Edaran, untuk menafikan hak perayu sebagai pemiutang penghakiman. Guaman kedua perayu telah ditolak oleh Mahkamah Tinggi atas alasan, antara lain, bahawa (i) ia telah dihalang oleh *res judicata* kerana guaman kedua adalah berdasarkan guaman pertama dan oleh itu kausa tindakannya adalah sama; dan (ii) tuntutan perayu adalah pra-matang kerana penghakiman termeterai bagi guaman pertama tidak disampaikan kepada responden-responden, responden-responden tidak boleh dikatakan mengelak daripada jumlah penghakiman dengan perubahan nama syarikat. Oleh itu, rayuan ini.

Diputuskan (membenarkan rayuan dengan kos; mengenepikan penghakiman Mahkamah Tinggi)

Oleh Mohamad Ariff Yusof HMR menyampaikan penghakiman mahkamah:

(1) Terdapat keterangan yang mencukupi untuk membuktikan perniagaan secara fraud dalam erti kata s. 304 Akta. Mahkamah Tinggi telah tersalah arah ke atas kes yang diplidkan oleh perayu, dan juga telah tersalah arah mengenai undang-undang yang terpakai dan gagal menilai dengan betul dan mempertimbangkan keterangan di hadapan mahkamah yang menunjukkan satu kes niat untuk menipu perayu yang jelas.

(2) Meneliti pernyataan tuntutan, kes yang diplidkan oleh perayu bukan bahawa responden telah menukar nama LMK Edaran kepada SLMK Edaran dan oleh itu telah menipu perayu sebagai pemiutang. Adalah diplidkan dengan jelas bahawa Southern Taipan Sdn Bhd yang telah menukar namanya kepada SLMK Edaran. Apa yang telah perayu plidkan bukanlah perubahan nama seperti yang difahami oleh Mahkamah Tinggi, tetapi satu percubaan untuk menipu pemiutang dengan menukar papan tanda LMK Edaran dengan menambah huruf 'S' di hadapan 'LMK', dan selepas itu menjadikan LMK Edaran tidak aktif dengan memindahkan perniagaannya kepada SLMK (sebelumnya Southern Taipan Sdn Bhd). Oleh itu, Mahkamah Tinggi telah pada asasnya tersalahtafsir kes yang diplidkan perayu, membawa kepada suatu kekhilafan besar yang mewajarkan campur tangan rayuan.

(3) Tiada isu *res judicata* kerana tindakan di bawah s. 304 Akta berdasarkan kausa tindakan yang spesifik dan berbeza. Ia tidak berasaskan semata-mata untuk mendapatkan semula hutang, tetapi terhadap liabiliti persendirian seseorang yang terlibat dalam urusan menjalankan perniagaan syarikat untuk mengelak daripada membayar pemiutang secara fraud. Seseorang tidak boleh dengan munasabah menyimpulkan bahawa dengan membaca tuntutan yang diplidkan terhadap pengarah-pengarah/pemegang-pemegang saham dengan teliti, ia adalah sama dengan tuntutan sebelumnya terhadap syarikat tersebut. Seksyen 304 adalah berkenaan tindakan tidak jujur yang melibatkan kesalahan moral sebenar mengikut tanggapan semasa dagangan.

(4) Seksyen 304 hanya menggunakan 'if it appears' yang mana menunjukkan bahawa beban bukti yang lebih rendah diperlukan, dan adalah perlu untuk membuktikan 'niat' untuk menipu. Oleh itu, perayu telah mengemukakan keterangan yang mencukupi bagi niat untuk menipu atas imbangan kebarangkalian bagi mewajarkan bahawa semua kehendak di bawah s. 304 telah dibuktikan.

(5) Isu bahawa tuntutan adalah pra-matang adalah tanpa merit. Jika perayu berniat menguatkuasakan penghakiman tersebut terhadap syarikat, perayu perlu mendapatkan penghakiman termeterai dan menyampaikannya kepada LMK Edaran, kini menyamar sebagai SLMK Edaran, tetapi perayu telah memilih untuk mendakwa responden-responden di bawah s. 304 Akta. Ini merupakan kausa tindakan yang berasingan.

Case(s) referred to:

Aik Ming (M) Sdn Bhd & Ors v. Chang Ching Chuen & Ors & Another Case [1995] 3 CLJ 639 CA ***(refd)***

LMW Electronics Pte Ltd v. Ang Chuang Juay & Ors [2010] 4 CLJ 849 HC ***(refd)***

Siow Yoon Keong v. H Rosen Engineering BV [2003] 4 CLJ 68 CA ***(refd)***

Sivalingam Periasamy v. Periasamy & Anor [1996] 4 CLJ 545 CA ***(refd)***

Legislation referred to:

Companies Act 1965, s. 304(1)

A *For the appellant - Brian Cumming (YJ Yap with him); M/s Gideon Tan Razali Zaini*
For the respondents - Elzubaiyah Meriam Nor Mohd Yusoff; M/s Yusof Nor & Co

[Appeal from High Court, Kota Bharu; Suit No: MT1-22-NCVC-35-03-2013]

Reported by Sandra Gabriel

B

JUDGMENT

Mohamad Ariff Yusof JCA:

[1] In this appeal, the appellant was the plaintiff in the High Court. The
C appellant filed a writ action against the respondents as defendants seeking remedies under s. 304 (1) of the Companies Act 1965 ("the Act"). The High Court dismissed the claim.

[2] The respondents were common directors and shareholders of two companies namely LMK Edaran Sdn Bhd and SLMK Edaran Sdn Bhd
D (hereafter, "LMK Edaran" and "SLMK Edaran"). In essence, the claim was grounded on fraudulent trading by LMK Edaran and its directors/ shareholders (the respondents) by which the plaintiff, as creditor of LMK Edaran, was defrauded in the sense that after judgment had been obtained against LMK Edaran, the business of LMK Edaran was transferred to SLMK
E Edaran, leaving LMK Edaran dormant so as to defeat the rights of the appellant as judgment creditor. The respondents are spouses, and at all material times were the only directors and shareholders of both companies.

[3] The appeal was allowed with costs, since it was clear that there was sufficient material evidence on the record to prove fraudulent trading within
F the meaning of s. 304 of the Act. The judgment of the High Court dismissing the claim was set aside, and it was ordered that judgment be entered as prayed in para. 22(c) of the statement of claim. We were of the opinion that the High Court had misdirected itself on the pleaded case of the appellant as plaintiff, and further, had misdirected itself on the applicable law as well as failed to
G properly evaluate and appreciate the evidence before the court which showed a patently clear case of an intention to defraud the plaintiff as creditor of LMK Edaran.

[4] The underlying facts are straightforward and can be stated very briefly. LMK Edaran was a purchaser of building materials from the
H appellant. Upon LMK Edaran's request, the appellant delivered a quantity of tiles and marble between the months of October 2004 and April 2005, which were acknowledged as having been delivered and received by LMK Edaran in good condition. As pleaded in para. 8 of the statement of claim, the total cost of these materials supplied over that period was
I RM309,481.20. None of the delivered items was paid for by LMK Edaran, with the result that as at 30 April 2005, the accumulated interest came to RM6,576.22, giving a total indebtedness of RM316,057.42.

[5] The appellant demanded payment without success, leading it to file an action in the High Court, Kota Bharu to recover the sum owing. Judgment was entered against LMK Edaran for this sum in that writ action (writ saman 22-91-2005). That suit was commenced on 12 October 2005. The judgment against LMK Edaran was allowed by the High Court on 23 December 2010.

[6] It was common ground that the sealed judgment was not served on LMK Edaran. Despite securing the judgment, LMK Edaran failed to settle the indebtedness.

[7] The facts also disclosed that shortly after the letter of demand was sent before filing the writ action, LMK Edaran had changed its company signboard from LMK Edaran to SLMK Edaran. This was done around November 2005, the information being supplied by LMK Edaran's customers itself to the appellant. The change was done by adding the alphabet 'S' to the signboard in the Romanised script, but the Chinese characters were left unaltered, and similarly the facsimile number, telephone number and the logo.

[8] It was not in dispute that SLMK Edaran was formerly known as Southern Taipan Sdn Bhd and incorporated on 13 May 1996. The name change to SLMK Edaran was done only on 5 September 2005, that is, about more than two months after the appellant sent the letter of demand to LMK Edaran.

[9] It is also not in dispute that the company searches disclosed that in 2005, LMK Edaran was an active company, with SLMK Edaran being a dormant company, but by 2008, the position was reversed, and remained as such until 2012, the date of the latest company search done before this present writ action was filed.

[10] The respondents were also previously directors of the appellant from 1984 until 19 June 2005, who were not re-elected as directors in 2005 because the relationship between the respondents and other members of the board of the appellant had turned sour. The first respondent (the husband) was in fact an executive director of the appellant.

[11] The indebtedness owing by LMK Edaran remained unpaid at all material times.

[12] In these circumstances, the appellant filed the present writ action, the subject matter of this appeal, relying on s. 304(1) of the Act, which reads:

> If in the course of the winding up of a company or in any proceedings against a company it appears that any business of the company has been carried on with intent to defraud creditors of the company or creditors of any other person or for any fraudulent purpose, the Court on the application of the liquidator or any creditor or contributory of the company, may, if it thinks proper so to do, declare that any person who was knowingly a party to the carrying on of the business in that manner shall be personally responsible, without any limitation of liability, for all or any of the debts or other liabilities of the company as the Court directs.

[13] We underscore the relevant wording of this provision, particularly the use of the formula if "it appears that any business of the company has been carried on with intent to defraud creditors of the company".

[14] The summary of the appellant's claim is expressed in counsel's written submission before us:

> In brief, the Appellant's case against the Respondents in this suit is that the 1st and 2nd Respondents have intentionally defrauded the appellant (creditor) by transferring out the assets and business from their company, LMK Edaran Sdn Bhd to SLMK Edaran, another company controlled by them in order to prevent the debt owed by LMK Edaran Sdn Bhd to the Appellant.

[15] As indicated earlier, the High Court dismissed the claim. Three broad grounds appear from the High Court judgment, which we quote below:

> Setelah meneliti keseluruhan keterangan yang dikemukakan dan menimbang hujahan peguamcara yang terpelajar, saya mendapati Plaintif gagal membuktikan samada tuntutan utama ataupun tuntutan alternative terhadap defendan. Berdasarkan alasan di atas saya mendapati tuntutan plaintif adalah tidak bermerit, *res judicata* dan adalah pra matang. Oleh itu, atas imbangan keberangkalian, saya menolak tuntutan plaintif bagi Perintah Deklarasi di bawah seksyen 304 Akta Syarikat 1965 gagal dibuktikan …

[16] As this passage makes apparent, the High Court dismissed the appellant's claim because (a) it had no merits, (b) it was barred by *res judicata*, and (c) it was premature. The learned trial judge, in analysing the pleaded case of the appellant, found that the appellant had pleaded that LMK had changed its name to SLMK and had transferred its business and indebtedness to SLMK with the fraudulent intention to defeat the appellant's judgment debt. When referring to the respondents' defence, the learned trial judge said:

> Keterangan defendan diberikan melalui defendan sendiri (SD1 dan SD2), Secara ringkasnya defendan menafikan telah menukar nama syarikat dari LMK kepada SLMK. Mereka juga menafikan telah bertindak dengan niat untuk menipu pemiutang dan plaintif. Berhubung jumlah RM309,418.20 yang dituntut, defendan mendakwa ianya telah diputuskan secara muktamad oleh Mahkamah dalam kes Writ Saman No. 22-91-2005 dan dengan itu tindakan plaintif adalah *res judicata*.

[17] The High Court then proceeded to stipulate the issues for decision in the following manner:

> Berdasarkan kertas kausa serta keterangan yang diberikan secara naratif isu-isu utama yang perlu diputuskan adalah:
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> i. Adakah Defendan menukar nama syarikat dari LMK Edaran Sdn Bhd kepada SMLK Edaran Sdn Bhd?
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> ii. Jika ada penukaran, adakah penukaran nama tersebut, dilakukan dengan tujuan untuk menipu pemiutang atau plaintif?

iii. Adakah berdasarkan fakta kes ini, peruntukan seksyen 304 Akta Syarikat 1965 terpakai? A

iv. Adakah defendan secara bersama atau berasingan bertanggungan membayar plaintif jumlah RM309,418.20?

v. Adakah tindakan plaintif *res judicata*? B

[18] Based on the trial judge's understanding of the pleaded case and the issues, it was apparent His Lordship believed the appellant's/plaintiff's claim rested on the all-important question whether the respondents/defendants had changed the name of LMK Edaran to SLMK Edaran, and this led the High Court to conclude that the company search tendered during trial (exh. D3) showed otherwise, namely the company that had the name change was Southern Taipan Sdn Bhd, and the change was done in accordance with legal procedure and with the approval of the Registrar of Companies. The High Court went on to conclude that there was no evidence that the change was effected with *mala fide* intent. We quote below the relevant excerpt from the judgment: C D

> Dalam pliding mereka plaintif di perenggan 17 Pernyataan Tuntutan adalah amat jelas di mana defendan didakwa plaintif dengan niat yang curang bertujuan menipu pemiutang dan plaintif telah menukar nama syarikat LMK kepada SLMK. Pliding tersebut tidak pernah dipinda. Oleh itu plaintif adalah terikat dengan pengataan dalam pliding mereka tersebut iaitu, plaintif perlu membuktikan bahawa defendan telah menukar syarikat LMK kepada SLMK. E
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> Bagi isu pertama di atas saya mendapati keterangan yang dikemukakan gagal membuktikan apa yang didakwa oleh plaintif ...
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> Apa yang dilakukan oleh defendan adalah menukar nama syarikat Southern Taipan Sdn Bhd kepada SMLK Edaran Sdn Bhd. Plaintif tidak membuktikan penukaran nama tersebut dilakukan untuk menipu pemiutang … F
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> Berdasarkan dapatan saya … isu kedua pada hemat saya menjadi akademik kerana isu kedua bergantung kepada dapatan bahawa sememangnya defendan telah menukar nama syarikat LMK kepada SLMK … G
>
> Akta Syarikat 1965 membenarkan nama suatu syarikat ditukar dengan kelulusan Pendaftar Syarikat …

[19] Aside from the above findings, the High Court also questioned why there was no police report lodged by the appellant if its claim was based on it being defrauded by the respondents. Further, the High Court, noting that no sealed copy of the earlier judgment had been served on LMK, concluded the claim under s. 304 was premature, asking the question: "Oleh itu bagaimanakah defendan boleh dikatakan cuba mengelak dari membayar jumlah penghakiman melalui cara menukar nama syarikat tersebut?". Lastly, H I

A the court applied the doctrine of *res judicata* by concluding the second writ action was based on the same earlier claim, and therefore the same cause of action, against LMK.

[20] In the submissions before us, the appellant summarised its grounds for the appeal as follows:

B

(a) The learned trial judge misunderstood the appellant's cause of action under s. 304, ie, by misunderstanding the pleaded case and stating that the respondents changed the company name of LMK Edaran to SLMK Edaran with the intention to defraud creditors and the appellant;

C (b) The trial judge erred in ruling that no police report had been lodged by the appellant against the respondents on the name change and therefore there was no element of cheating proven;

(c) The trial judge erred in ruling that the sealed copy of the earlier judgment had first to be served on LMK Edaran before action under
D s. 304 could be commenced against the respondents; and

(d) The trial judge erred in finding that *res judicata* applied.

[21] We found the appellant's submissions on these grounds had compelling merits. We found there was a fundamental misdirection in the
E High Court's finding on the appellant's pleaded case. On a proper reading of the statement of claim, with respect, it was not the pleaded case of the appellant that the respondents had changed the name of LMK Edaran to SLMK Edaran and therefore defrauded the appellant as creditor. It was expressly pleaded that it was Southern Taipan Sdn Bhd that had its name
F changed to SLMK Edaran Sdn Bhd. What the appellant pleaded was not so much a name change in the sense understood by the High Court, but an attempt to defraud creditors by changing the signboard of LMK Edaran by adding the alphabet "S" in front of "LMK", and thereafter rendering LMK Edaran dormant by transferring its business to SLMK (previously Southern
G Taipan Sdn Bhd). See paras. 10 to 21 of the statement of claim, particularly paras. 19 to 21:

> 19. The SLMK EDARAN, has changed its previous name of Southern Taipan Sdn Bhd, to its current name on 5.9.2005, ie, after the plaintiff has served on the LMK EDARAN, its letter of demand dated 12.6.2005 to demand for the outstanding sum as mentioned here at paragraph 9.
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> H
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> 20. Neither did the defendants take the liberty to inform the plaintiff of the change of name of the companies.
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> 21. In view of the above, the plaintiff contends and will contend that the defendants:
>
> I Particulars of wrongful trading
>
> i. Have been knowingly involved in carrying on of the business with intent to defraud creditors of the LMK Edaran Sdn Bhd;

ii. Has engaged with wrongful trading and with intend to defraud the creditors;

iii. At the material times, the said Directors were knowingly a party to the carrying on of the business of the LMK Edaran Sdn Bhd with the intent to defraud its creditors including the plaintiff;

iv. Despite knowing the increasing debts owed to the plaintiff, the 1st and 2nd Defendants, being the Directors for the LMK Edaran Sdn Bhd, when demanded for payments at that material time did not have good reasons to believe that funds would be available to pay its creditors including plaintiff for the goods sold and delivered as and when those debts became due;

v. But nevertheless continue to mislead the plaintiff into believing that LMK Edaran Sdn Bhd are still financially strong;

vi. The 1st and 2nd defendants, jointly and severally, wrongfully with the intent to injure the plaintiff and/or to cause loss to the plaintiff by unlawful means, conspired and combined together to defraud the plaintiff and to thereafter conceal such fraud;

vii. The 1st and 2nd defendants, jointly and severally, wrongfully and conveniently changed the name from LMK Edaran to SMLK Edaran to avoid its responsibility to pay the outstanding and not reasonable prospect (sic) of the plaintiff ever receiving payment of the outstanding sum.

[22] A reading of these paragraphs will show clearly the High Court had fundamentally misconstrued the appellant's pleaded case, leading to a major error requiring our appellate intervention. Thus, if the learned trial judge had properly directed his mind to the actual pleaded case, we believe His Lordship would not have so readily concluded that the action was premature, or that it was subject to *res judicata*. Whether or not the action was premature depended on a combination of relevant facts in light of s. 304 of the Act.

[23] Section 304 is a specific statutory provision which allows the corporate veil to be lifted in the limited situations specified. Earlier in this judgment we have underlined that it is applicable in a situation where in the course of proceedings against a company, it appears that the business of the company has been carried on with intent to defraud creditors, a creditor can make an application to court to request that the court declare that any person who was knowingly a party to such carrying on of the business of the company, to be personally responsible. The evidence in this appeal showed precisely that. The directors and shareholders of LMK Edaran purposely and knowingly engaged in a course of conduct to mislead the appellant (by adding the 'S' to the signboard), and by the same token transferred the business of LMK Edaran to SLMK Edaran (previously Southern Taipan Sdn Bhd) to render LMK Edaran a dormant company. The witness for the appellant (SP1; Jeremy KH Chin, a director of the appellant) indeed testified that the

first respondent himself told him that they had transferred the business from LMK Edaran to SLMK Edaran to avoid payment of the debt owing. This evidence remained unchallenged throughout the trial. Counsel for the respondents failed to put the respondents' case directly to SP1 to challenge or rebut this evidence, and we agreed with the appellant's submission that this evidence must be deemed admitted on the strength of the case-authorities, such as *Aik Ming (M) Sdn Bhd & Ors v. Chang Ching Chuen & Ors & Another Case* [1995] 3 CLJ 639; [1995] 2 MLJ 770 and *Sivalingam Periasamy v. Periasamy & Anor* [1996] 4 CLJ 545. Counsel for the appellant highlighted the following relevant part of SP1's testimony which proved the requisite intention under s. 304:

> Q: Now I have one supplementary question here … Now Jeremy, can you tell the Court, did the defendant, 1st or 2nd defendant inform you of the reasons as to why they transferred the assets and business over?
>
> A: Yes, the 1st defendant actually told me that after they had transferred from LMK Edaran to SLMK Edaran our company cannot do anything from collecting the debts that incurred (sic) when the time he's the Executive Director of the Company. (p. 84, Appeal Record, Vol. 2 (1))

[24] On the facts of this appeal, there was no real issue of *res judicata*, since the s. 304 action is based on a specific and different cause of action provided under company legislation. It is not based on recovery for debt *per se*, but on the personal liability of the persons involved in the fraudulent course of carrying on the business of the company to avoid paying creditors. One cannot reasonably conclude that reading the pleaded claim against the directors/shareholders with precision, it is the same or similar with the previous claim against the company. Section 304 deals with dishonest conduct involving real moral blame according to current notions of fair trading among commercial men (*Siow Yoon Keong v. H Rosen Engineering BV* [2003] 4 CLJ 68).

[25] The Court of Appeal in *Siow Yoon Keong v. H Rosen Engineering BV*, *supra*, has also clarified that within the context of s. 304, a lower degree of proof is required to prove the fraudulent conduct: "Note that the section only uses the "if it appears" which indicates a lower degree of proof is required" (p. 80 of the report). See also *LMW Electronics Pte Ltd v. Ang Chuang Juay & Ors* [2010] 4 CLJ 849, where the court also held that a lower degree of proof was required, and it is necessary only to prove an "intention" to defraud.

[26] On the facts of this present appeal therefore, we were of the opinion that the appellant had adduced sufficient evidence of the intention to defraud on a balance of probabilities to justify us to conclude that all the requirements of s. 304 had been proven on the evidence. Indeed, even on the higher standard of proof, we would conclude the claim against the respondent could have been also established.

[27] Reverting to the issue of the claim being premature, this was an issue without merit. There was obviously no doubt that the earlier judgment was pronounced in court, and it would have force and validity as of that date of pronouncement. Equally obvious, if the appellant was minded to enforce that judgment against the company, it would have to extract the sealed judgment and serve on LMK Edaran, now masquerading as SLMK Edaran, but the appellant has also elected to proceed against the respondents under s. 304. That is an independent cause of action founded on morally blameworthy conduct on their part that law and policy should not leave unremedied among commercial men. It will create an undesirable precedent if this type of conduct is not corrected by the courts.

[28] We therefore allowed the appeal and ordered that judgment be entered for the appellant as prayed in para. 22(c) of the statement of claim.

[29] The judgment of the High Court was set aside. Costs of RM40,000 here and below was awarded to the appellant. The deposit was ordered to be refunded.